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NTSB Order No. EA-4203

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of June, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL B. GREEN and KENNETH F. WIGGERS, Respondents.	Dockets SE-13625 and SE-13626

OPINION AND ORDER

The Administrator and respondent Green have both appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on May 18, 1994, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge modified an emergency order of the Administrator revoking

[1]An excerpt from the hearing transcript containing the initial decision is attached.

the respondents' Airline Transport Pilot certificates to provide instead for a 60-day suspension of respondent Wiggers' certificate and a 30-day suspension of respondent Green's.[2] On appeal, the Administrator, arguing that the law judge erred in not sustaining charges that respondents had intentionally falsified certain pilot training records, seeks reinstatement of the sanction of revocation. Respondent Green argues that the law judge erred in upholding charges that he had operated an unauthorized Part 135 flight in a helicopter. For the reasons discussed below, we will deny the Administrator's appeal and grant respondent Green's.

With respect to the allegations that the respondents had falsified training records in violation of section 61.59(a)(2) of the Federal Aviation Regulations ("FAR", 14 CFR Part 61), our remarks will be summary, as the law judge has thoroughly explained the background and basis for those charges and his reasons, with which we agree, for rejecting them.[3] Respondents

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[2]Respondent Wiggers did not appeal from the law judge's decision. The Administrator and respondent Green have filed replies opposing each other's appeals.

[3]FAR section 61.59(a)(2) provides as follows:

§ 61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made--

* * * * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or

Green and Wiggers were, respectively, director of operations and chief pilot for CVG Aviation, Inc. ("CVG"), a Part 135 charter carrier based at Cincinnati/Northern Kentucky International Airport. In November of 1993, CVG contracted with a client to manage its IA Westwind II aircraft. Although CVG's five pilots, including the two respondents, had experience in other jet aircraft, they needed additional type ratings to operate the Westwind. Also, the aircraft needed to be added either to CVG's operating specifications or to those of another Part 135 certificate holder to be operated in Part 135 service. Four of the pilots obtained, in late November and early December, the necessary training and the type certificates from Robin Smith, who held FAA designations as a type rating examiner and a check airman on Westwind aircraft for two Part 135 operators.

CVG had no prior affiliation with Mr. Smith, who was from Oklahoma City, Oklahoma, but had found him through a search of advertisements in an aviation magazine. Mr. Smith, knowing that CVG was eager to put the Westwind into Part 135 service as quickly as possible, referred respondent Green to American Air Network ("AAN"), a Part 135 operator with Westwind authority in St. Louis, Missouri, for whom Smith and the owner of AAN, Mr. Douglas Gilliland, were FAA designated check airman. Mr. Gilliland, who, like Mr. Smith, had no prior connection with CVG, agreed to put the Westwind on AAN's certificate, and he traveled

(..continued)

[sic] any certificate or rating under this part....

to Cincinnati to give some additional training to the CVG pilots who would be operating the aircraft on AAN's certificate. However, while he flew, on January 23, 1994, with the four CVG pilots who were captains and observed their proficiency to some degree, before those flights he had filled out and dated, with that day's date, FAA Forms 8410-3 "Airman Competency/Proficiency Check" for them, based on the ground and flight training they had previously received from Mr. Smith about two months earlier. Respondents testified that Mr. Gilliland assured them, when they questioned him about the validity of using the prior training, that such a practice was acceptable to the FAA.

Ordinarily, the 8410's might not have been reviewed by the FAA. However, when CVG subsequently decided to operate the Westwind under its own certificate and sought a waiver of a proving tests requirement,[4] their Principal Operations Inspector (POI) requested, in addition to other information, the 8410's that CVG had for its Westwind pilots. The forms were submitted to the POI on February 28, 1994, the same day they were received by mail from AAN. The investigation out of which this proceeding arose began at that time.

The Administrator argues that, notwithstanding any advice given by Mr. Gilliland as to the propriety of reliance on the November-December type certificate training for the following January's Part 135 flight check, the respondents committed violations of the prohibition against intentional falsifications

[4]See FAR section 135.145.

because the 8410's indicate that the date of the Part 135 flight check was January 23, when, in fact, most of the required testing and maneuvers listed on the forms had not been accomplished on that date.

As the initial decision relates, the correctness of Mr. Gilliland's advice to the respondents is difficult to assess on the evidence the parties submitted.[5] It, however, seems to us that the respondents' accountability under FAR section 61.59 does not hinge on the bona fides of their disavowal of any intent to submit training records that were not truthful or accurate. This is so because the Administrator's case lacks proof on a fundamental, threshold element; namely, a causal link between the statements alleged to be false and the respondents, who concededly did not make them, since they did not fill out the forms.

It is not enough under the regulation merely to identify statements concerning an airman in a record required to be kept that the Administrator believes, for whatever reason, are false. He must show, in order to sanction an airman for any false statements in such a record, that the airman is responsible for

[5]On the one hand, there is evidence in the record that type certificate training can in some circumstances satisfy the requirements of a Part 135 competency check and that it is acceptable for a training record to reflect just the last date on which training within the preceding three months was completed. On the other hand, it is not entirely clear that all of the circumstances which would validate either or both of those practices were present in this case. See Air Transportation Operations Inspector's Handbook, FAA Order No. 8400.10, Vol. 3, Paragraphs 543(A) and 603(A)(1), Change 4 (1990).

the statements. In this case, there is no evidence, direct or circumstantial, to support a finding that any false statements the forms may contain were made or caused to be made by the respondents.[6] To the contrary, all of the evidence establishes that the forms were filled out by Mr. Gilliland based solely on his belief that the type certificate training could be credited toward the Part 135 flight check. It therefore makes no difference, for purposes of FAR section 61.59, whether the respondents agreed or disagreed with Mr. Gilliland's views on the matter, for there is absolutely no evidence that Mr. Gilliland's actions in filling out the 8410's were influenced in any way by the respondents.[7] Consequently, they cannot be found to have caused whatever falsity the forms may reflect.

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[6]We agree with the law judge that it is far from clear that the forms can reasonably be said to contain any false statements, much less any intentionally false statements. Moreover, given the absence of any showing that respondents had any role with respect to the manner in which Mr. Gilliland filled out the forms, we cannot understand either why the inspectors investigating this matter chose to totally ignore respondents' explanations as to what Mr. Gilliland had told them or why the Administrator in effect chose to prosecute respondents for Mr. Gilliland's allegedly mistaken views on how to fill out the forms properly. In our judgment, if the forms were filled out using nonqualifying training, but there was no indication that the error was the product of an attempt to circumvent or mislead as to the adequacy or timing of actual training received, counseling by the inspectors to dispel whatever confusion or misjudgments had produced the mistakes would seem to be an appropriate and adequate response to their discovery.

[7]Neither does it make any difference that the forms were given to the inspectors by the respondents, rather than Mr. Gilliland. The regulation does not speak to the submission of false statements, but to their creation. It is thus of no decisional significance under this regulation that in some circumstances the tendering of false information produced by others could be construed as an endorsement of it.

With regard to the alleged violations of FAR sections 135.3 and 135.5,[8] it is undisputed that respondent Green did not himself physically operate the helicopter, but, as the law judge concluded, authorized and was aware of at least the second of two roundtrip cargo-hauling flights that respondent Wiggers piloted. The law judge appears to have reasoned that respondent Green's knowledge of that flight was sufficient to establish the violations because, as director of operations, he could be said to have acquiesced in the operation. We view the issue differently.

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[8]FAR sections 135.3 and 135.5 provide, in relevant part, as follows:

> § 135.3 **Rules applicable to operations subject to this part.**
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> Each person operating an aircraft in operations under this part shall--
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> (a) While operating inside the United States, comply with the applicable rules of this chapter....
>
> § 135.5 **Certificate and operations specifications required.**
>
> No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part, or, for operations with large aircraft having a maximum passenger seating configuration, excluding any pilot seat, of more than 30 seats, or a maximum payload of more than 7,500 pounds, without, or in violation of, appropriate operations specifications issued under Part 121 of this chapter.

It is alleged that respondents operated a Bell Helicopter on a Part 135 flight when CVG was not certified or authorized to conduct helicopter operations in air transportation under Part 135.

As chief pilot, respondent Wiggers had, so far as can be determined on this record, full authority to operate the helicopter without respondent Green's approval or consent.[9] Thus, any obligation respondent Green might have had to ensure that the flights not be made unless the requirements for an exception to the applicability of Part 135 had been met flowed exclusively from his corporate or company responsibilities as an officer of CVG, not from his personal obligations as an ATP certificate holder. We therefore do not think any violation that he may have committed as an agent of CVG justifies a sanction against his certificate under the regulations cited.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. Respondent Green's appeal is granted; and

3. The initial decision is affirmed to the extent it dismissed the charges under FAR section 61.59 against both respondents and reversed to the extent it sustained FAR section 135.3 and 135.5 charges as to respondent Green.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

[9]It appears that respondent Wiggers, at least before the first of the two flights to pick up cargo, mistakenly believed that the cargo was not located more than 25 miles away, and asserts that he was not then aware of a 72-hour advance notice requirement. See FAR section 135.1(b)(7). Respondent Green later flew the cargo by Learjet to its ultimate destination.